

1 KEKER, VAN NEST & PETERS LLP
MATAN SHACHAM - # 262348
2 mshacham@keker.com
WILLIAM S. HICKS - #256095
3 whicks@keker.com
633 Battery Street
4 San Francisco, CA 94111-1809
Telephone: 415 391 5400
5 Facsimile: 415 397 7188Wi

6 Attorneys for Defendant
FACEBOOK, INC.
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11 JASON FYK,
12 Plaintiff,
13 v.
14 FACEBOOK, INC.,
15 Defendant.
16

Case No. 4:18-CV-05159-JSW

**FACEBOOK'S OPPOSITION TO
PLAINTIFF'S REQUEST FOR
JUDICIAL NOTICE**

Date: April 5, 2018
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White
Dept.: Courtroom 5

Date Filed August 22, 2018
Trial Date Not set

I. INTRODUCTION

To support his response to Facebook’s motion to dismiss [Dkt. No. 27], Plaintiff requests the Court to take judicial notice of three categories of materials that allegedly are, or were, in the public domain:

1. The text of 47 U.S.C. § 230 (Greyber Decl. ¶ 2, Ex. A);
2. Screenshots purportedly showing two of Plaintiff’s Facebook pages (*Id.* ¶ 3, Ex. B); and
3. Copies of news articles, newscasts, and congressional testimony purportedly obtained from the internet (*Id.* ¶¶ 3-5, Exs. C-D).

Dkt. No. 28 (Request for Judicial Notice & Greyber Declaration).

The Court should deny Plaintiff’s request in its entirety because Plaintiff has failed to demonstrate that any of these materials are the proper subject of judicial notice.

II. LEGAL STANDARD

Courts ordinarily “may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citing *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), overruled on other grounds by *Galbraith v. Cnty of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002)); *see also MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

As a limited exception to that rule, the Court may take judicial notice of matters that are “either (1) generally known within the trial court’s territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Minor v. FedEx Office & Print Servs., Inc.*, 78 F. Supp. 3d 1021, 1027 (N.D. Cal. 2015); Fed. R. Evid. 201(b). “Rule 201(b) limits judicial notice to ‘indisputable’ facts, thus limiting the use of judicial notice to clear cases.” *Rollins v. Dignity Health*, 338 F. Supp. 3d 1025 (N.D. Cal. 2018) (quoting 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure (Evidence)* § 5102.2 (2d ed. 2005)).

Moreover, because “any evidence considered by the Court must be relevant evidence,” courts decline to judicially notice materials that are not relevant to the matter at issue. *Twitter*,

1 *Inc. v. Sessions*, 263 F. Supp. 3d 803, 806 n. 2 (N.D. Cal. 2017) (denying judicial notice of
2 irrelevant materials that were not from a source whose accuracy could not reasonably be
3 questioned).

4 **III. ARGUMENT**

5 None of the materials attached to Plaintiff's response to Facebook's motion to dismiss is
6 properly the subject of judicial notice.

7 The text of CDA Section 230 (Greyber Ex. A) is not a judicial *fact* and therefore is not the
8 proper subject of judicial notice. To be sure, the Court must apply Section 230(c)(1) in ruling on
9 Facebook's motion to dismiss, but it can and should do so without resort to materials that Plaintiff
10 downloaded from the internet.

11 The screenshots purportedly showing certain of Plaintiff's Facebook pages (Greyber Ex.
12 B) are also not the proper subject of judicial notice. These materials are not generally known
13 within this Court's territorial jurisdiction, nor are they capable of accurate and ready
14 determination by resort to sources whose accuracy cannot reasonably be questioned. *Minor*, 78 F.
15 Supp. 3d at 1027; Fed. R. Evid. 201(b). Moreover, they are irrelevant. *Twitter*, 263 F. Supp. 3d at
16 806 n. 2; *Lewis v. Liberty Mut. Ins. Co.*, 321 F. Supp. 3d 1076, 1079 n. 1 (N.D. Cal. 2018)
17 (declining to take judicial notice of materials not necessary to resolution of motion). Accordingly,
18 judicial notice is improper and should be denied.

19 The Court should also decline to grant Plaintiff's request for judicial notice of news
20 articles and other materials falling into the third category. *See* Greyber Exs. C-D. A document is
21 not "judicially noticeable simply because it appears on a publicly available website, regardless of
22 who maintains the website or the purpose of the document." *Rollins v. Dignity Health*, 338 F.
23 Supp. 3d 1025 (N.D. Cal. 2018). Nevertheless, Plaintiff apparently seeks to rely on these
24 inherently unreliable materials as hearsay evidence of what other people are purportedly saying
25 about Facebook. *See, e.g.*, Opp. at 14, n. 13 (citing Ex. C and asserting that "it is not just us
26 talking about Facebook's unfair direct competitive tactics"); *id.* at 14, n. 14 (citing Ex. D. and
27 asserting that "it is not just us talking about Facebook's fraudulent / misrepresentative ways").
28 Judicial notice should be denied because these materials do not concern facts that are not

1 generally known within this Court’s territorial jurisdiction, nor are they capable of accurate and
2 ready determination by resort to sources whose accuracy cannot reasonably be questioned, nor are
3 they relevant in any way to this action or Facebook’s motion to dismiss. *See, e.g., Ruiz v. Gap,*
4 *Inc.*, 540 F. Supp. 2d 1121, 1124 (N.D. Cal. 2008), *aff’d*, 380 F. App’x 689 (9th Cir. 2010)
5 (declining judicial notice of “a study from an internet site on identity theft, and a list, also from an
6 internet site, of data breach incidents reported in California in the last two years”; noting that
7 “these materials are not remotely akin to the type of facts which may be appropriately judicially
8 noticed”).

9 As an apparent alternative to judicial notice, Plaintiff also urges the Court to consider his
10 proposed materials on the purported basis that “the subject matter of the above-listed materials is
11 referred to in and/or implicated by the Complaint and/or the Motion to Dismiss.” Dkt. No. 28 at 2.
12 The Court should decline to do so because the doctrine of incorporation by reference, upon which
13 Plaintiff purports to rely, does not apply here. Under that doctrine, the Court may consider not
14 only documents attached to the complaint, but also documents whose contents are alleged in the
15 complaint, provided that (1) the complaint “necessarily relies” on the documents or contents
16 thereof, (2) the document’s authenticity is uncontested, and (3) the document’s relevance is
17 uncontested. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); *see also Lee*,
18 250 F.3d at 688–89. Plaintiff has not argued, much less established, that any of these
19 requirements is satisfied. Plaintiff’s Complaint does not attach any of these documents, nor does
20 Plaintiff contend that the Complaint “necessarily relies” on them. Moreover, Facebook disputes
21 both authenticity and relevance.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should deny Plaintiff's request for judicial notice in
3 its entirety.

4 Respectfully submitted,

5 Dated: December 28, 2018

KEKER, VAN NEST & PETERS LLP

6
7 By: /s/ William S. Hicks
MATAN SHACHAM
8 WILLIAM S. HICKS

9 Attorneys for Defendant
10 FACEBOOK, INC.
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28